IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

WP(C).No. 27563 of 2007(F)

PETITIONERS:

1. **M.J.BETTY,**
   MANAGING PARTNER, M/S. METRO SILKS & SAREES,
   METRO BAZAR, ANGAMALY.

2. **M.J.TOMY,**
   PROPRIETOR, M/S. METRO TEXTILES,
   METRO BAZAR, ANGAMALY.

3. **M.J.TOMY,**
   MANAGING PARTNER, METRO TRADERS,
   METRO BAZAR, ANGAMALY.

4. **M.J.BETTY,**
   MUNDAN HOUSE, ANGAMALY P.O.

BY ADV. SRI.GEORGE ABRAHAM

RESPONDENTS:

1. **UNION BANK OF INDIA,**
   H.O.239, VIDHAN BHAVAN MARG, MUMBAI-21,
   REPRESENTED BY ITS CHAIRMAN.

2. **REGIONAL MANAGER,**
   UNION BANK OF INDIA, UNION BANK BHAVAN,
   P.B.NO.3667, M.G.ROAD, KOCHI-35.

3. **CHIEF MANAGER & AUTHORISED OFFICER,**
   UNION BANK OF INDIA, UNION BANK BHAVAN,
   P.B.NO.3667, M.G.ROAD, KOCHI-35.

4. **BRANCH MANAGER,**
   UNION BANK OF INDIA, ANGAMALY.

BY ADV. SRI.A.S.P.KURUP, SC, UBI

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05/10/2007, THE COURT ON 16/10/2007 DELIVERED THE FOLLOWING:

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ANTONY DOMINIC, J.

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W.P.(C) No. 27563 OF 2007 - F
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Dated this the 16th October, 2007

J U D G M E N T

The question that arises for consideration in this writ petition is whether the 1st respondent was justified in declaring the accounts of the petitioners to be Non-Performing Assets (NPA for short).

2. The facts of the case are that petitioners 1 to 3 herein, who are conducting textile business, had availed of from the 1st respondent cash credit facilities for Rs.56 lakhs, Rs.10 lakhs and Rs. 23 lakhs respectively. In so far as the 4th petitioner is concerned she had availed of a house building loan for Rs.12 lakhs. As security for the above, petitioners had offered a commercial building in Angamali Town situated in a plot of 6 cents of land. In addition to this two plots having an extent of 35 cents and 25 cents each with building therein, were also given. According to the petitioners these properties are worth at least Rs.8 crores.

3. Petitioners would submit that in 2001, on

account of certain misunderstanding between the Branch Manager of the Bank and themselves, the Bank refused to renew the cash credit facility and caused a lawyer notice issued to them requiring them to repay the entire amount availed of. It is pointed out that thereafter invoking the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act' for short) Ext. P4 notice under Section 13(2) was issued on 1-8-2007. Thereupon, petitioners submitted Ext. P11 representation dated 7-8-2007 agreeing to immediately pay Rs.25 lakhs and requesting the bank not to proceed further with Ext. P4. Even thereafter, the Bank issued Ext. P5 notice dated 13-8-2007 under Section 13(4) of the Act to which they had filed an objection. Thereupon, the petitioners approached the 2nd respondent who had instructed them to remit Rs.25 lakhs offered in Ext. P11 and in compliance thereof, they had remitted an amount of Rs.24.25 lakhs.

4. Inspite of it on 3-9-2007 Exts. P6 to P9 were issued requiring them to pay the entire amount availed

of by them. They had filed Ext. P10 objection and as they apprehended further action from the Bank this writ petition was filed on 14-9-2007 seeking to quash Exts. P6 to P9 and to direct respondents 2 to 4 to renew the cash credit facility availed of by them. They also sought a further direction requiring the Bank not to take any action pursuant to Exts. P6 to P9. Subsequently, petitioners filed I.A. No. 12586 of 2007 producing Exts. P12 to P15, statements of account issued by the Bank as on 15-9-2007 which indicate that the credit availed of by them was far below the limit prescribed by the Bank.

5. A counter affidavit has been filed by the Bank in which the petitioners have been described as defaulters. It is also the contention of the Bank that the renewal granted was only upto 2006 and that the petitioners were not submitting their balance-sheet, financial statements, stock statements and audit reports. Therefore even when renewal was granted by Exts. P1 to P3 it was indicated that the Bank will be reviewing the progress of the accounts in the month of August, 2006. Bank would state that the petitioners

had not approached them for renewal of the facility and that in any case in view of their unsatisfactory performance, the Bank would not have renewed it.

6. In paragraph 6 of the counter affidavit, answering the contention of the petitioners that the value of the properties mortgaged by them is more than Rs.8 crores, it is stated that there is no dispute regarding the value of the security offered by the petitioners even though the value may not be that much as narrated by them. Justifying their action in declaring the accounts to be NPA, it is stated that in so far as the 1st petitioner is concerned as against Rs.56 lakhs credit limit, the outstanding as on 31-3-2007 was Rs.63,29,723.97 and that as against the sanctioned limit of Rs.10 lakhs for the 2nd petitioner, the outstanding was Rs.11, 20,092/-. It is further stated that as far as the 3rd petitioner is concerned, while the sanctioned limit was Rs.23 lakhs, the outstanding as on 31-3-2007 was Rs.26,74,697/- and in the housing loan account availed of by the 4th petitioner, Rs.53,643/- was overdue for payment. It is stated that on account of the wilful default as above

and the substantial amount that was remaining outstanding the Bank classified the accounts as NPA with effect from 31-3-2007.

7. It is also stated that when notices under Section 13(2) of the Act there was no objection from the petitioners and thereafter notice under Section 13 (4) were issued and the Bank took possession of the properties on 14-9-2007, the date on which this writ petition was filed. Exts. R4(a), (b) and (c) are the mahazars, possession notices published in the newspapers and the photographs evidencing the take over of the properties. According to the Bank, if at all the petitioners are aggrieved, the remedy available to them is to file appeals to the Debt Recovery Tribunal and they are not entitled to invoke the extraordinary jurisdiction of this Court.

8. A reply affidavit has been filed by the petitioners on 24-9-2007 in which, answering the contention that the petitioners had not produced documents which were required for the renewal of cash credit facility, the petitioners would state that they were always willing to produce these documents, but the

Manager of the Bank was not willing to accept the same. They would further reiterate that on receipt of the notice under Section 13(2) they approached the 2nd respondent and it was on his direction that they had deposited Rs.24.25 lakhs. They would contend that in terms of the guidelines issued by the Reserve Bank of India which is binding on the respondent-Bank, their accounts could not have been classified as NPA and that the classification so made is an arbitrary exercise of power justifying invocation of the powers of this Court under Article 226 of the Constitution. They have also elaborately referred to the guidelines of the Reserve Bank of India in terms of which only the account could be classified as NPA and reiterate their contention that there is a patent violation of these guidelines.

9. Subsequent to the filing of the reply affidavit, on 26-9-2007, the Bank filed an additional counter affidavit. In paragraph 2 thereof, the reasons for declaring the accounts as NPA have been detailed in the following manner:

(1) The party has not paid the interest portion

and the outstanding amount was far above the sanctioned limit.

(2) In CCH accounts the clear stipulation is that amount in the account must be always below the sanctioned limit. Once it goes above the sanctioned limit it is an overdrawing and accumulation of interest.

(3) Similarly they have not submitted the audited balance sheet for the year 2005-2006 and 2006-07. They were irregular in the matter of submitting stock statements and financial statements and cheques issued were dis-honoured.

10. The bank has also produced Exts. R4D, E, F and G indicating the total amount due from the accounts of the petitioners as on 25-9-2007. It is stated that the outstanding as on 25-9-2007 in the accounts of petitioners 1 to 4 were Rs.55,36,477.97, Rs.7,21,543.29, Rs.21,65,578.38 and Rs.10,25,954/- respectively. However, the additional counter affidavit filed by the Bank is also silent on the contention raised by the petitioners regarding the irregularity in classifying the account as NPA with

reference to the guidelines issued by the Reserve Bank of India.

11. Thus, from the averments in the counter affidavit, it is to be noted that the following averments of the writ petitioners stand undisputed: (1) That the value of the security offered is Rs.8 crores as averred by the petitioners. (2) That on the direction of the 2nd respondent, the petitioners have remitted an amount of Rs.24.25 lakhs by crediting their daily income during the period 13-8-2007 to 25-8-2007. (3) The further allegation that the establishments of petitioners 1 to 3 are running establishments which employed about 180 persons (in reply affidavit it is stated to be 140 persons). The averment that there was some misunderstanding with the Manager which even resulted in heated argument with him and that resulted in the initiation of the proceedings.

12. On these pleadings, the point that was urged by the learned counsel for the writ petitioner, was that the bank could not have classified the account as NPA as on 31-3-2007. Therefore, I am only concerned with the correctness or otherwise of the action of the

Bank in this regard. Since the counsel for the respondent Bank contended that in view of Section 17 of the Act, the remedy available to the petitioners is to file appeal before the Debt Recovery Tribunal, that question also falls for consideration.

13. While examining the legality of classifying the accounts as NPA, the cash credit originally sanctioned, the outstanding as on 31-3-2007, 15-9-2007 and 25-9-2007, which are available on record needs to be seen. For easy reference, I will put it in the form of a comparative statement in the following manner:

STATEMENT

	Limit (in lakhs)	As on 31.3.07	15.9.07	25.9.07
1	56	63,29,723.97	43,50,120.00	55,36,477.97
2	10	11,20,092.00	5,25,120.00	7,21,543.29
3	23	26,74,697.00	16,00,586.80	21,65,578.38
4	12(HBA)	54,643.00	9,71,643.00 (Exts. P12 to P15)	10,25,954.00 (Exts. R4D to G)

Thus while the Bank is right in contending for the position that as on 31-3-2007 when the account was classified as NPA (the outstandings were in excess of the limits). But when the Bank took possession on 14-

9-2007 the outstandings in all the accounts were far below the limit fixed and this is evident from Exts. P12 to P15 statements of account issued by the Bank itself. Even on 25-9-2007, the outstanding amounts were much below the limit fixed by the Bank and this is also evident from Exts. R4D to G produced along with the additional counter affidavit filed by the Bank.

14. However, dealing with the contention that as on 15-9-2007 the outstanding amount was below the limit fixed by the Bank, the learned counsel for the Bank at one stage argued that since the classification as NPA was as on 31-3-2007, the position of the accounts as on 15-9-2007 is irrelevant. Irrespective of the correctness of this, if that be the logic I fail to see the relevance of the figures as on 25.09.2007 supplied by the Bank through Exts. R4D to G. In any case, there is substantial difference in the figures in Exts. P12 to P15, statements of accounts as on 15-9-2007 and Exts. R4D to G, statement of accounts as on 25-9-2007 and this has not been explained by the Bank in the affidavits filed.

15. The expression N.P.A is defined in Section 2

(o) which is extracted below for reference:

> "Section 2(o). "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,"
>
> (a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
>
> b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;

Thus, going by its definition, NPA means an asset or account of a borrower which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset in accordance with the guidelines, relating to asset classifications, issued by the Reserve Bank of India.

16. The Master Circular – Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances dated 1st July, 2006 issued by the Reserve Bank of India is the one which is relevant. This circular defines Non-Performing Assets

as follows:

"2.1.2 A non-performing asset (NPA) is a loan or an advance where;

i) interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

ii) the account remains 'out of order' as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),

iii) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

iv) the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops,

v) the instalment of principal or interest thereon remains overdue for one crop season for long duration crops.

2.1.3 Banks should, classify an account as NPA only if the interest charged during any quarter is not serviced fully within 90 days from the end of the quarter.

2.2 'Out of Order' status

An account should be treated as 'out of order' if the outstanding balance remains continuously in excess of the sanctioned limit/drawing power. In cases where the outstanding balance in the principal operating account is less than the sanctioned limit/drawing power, but there are no credits continuously for 90 days as on the date of Balance Sheet or credits are not enough to cover the interest debited during the same period, these accounts should be treated as 'out of order'.

17. Para 4 of the circular states that the Banks are required to classify non-performing assets further into the three categories, namely, Sub-standard Assets, Doubtful Assets and Loss Assets. In terms of paragraphs 4.1.1, 4.1.2 and 4.1.3 of the circular a non-performing asset can be classified as Sub-standard or Doubtful if it has remained in any one of such categories as defined in the circular for a period of 12 months. As far as Loss Assets is concerned it should be identified by the bank and the amount has not been written off wholly. Such an asset is considered as uncollectible and of little value that its continuance as a bankable asset is not warranted.

18. Circular specifically provides in para 4.2.3 as follows:

> "Bank should not classify an advance account as NPA merely due to the existence of some deficiencies which are temporary in nature such as non-availability of adequate drawing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-submission of stock statements and non-renewal of the limits on the due date, etc. In the matter of classification of accounts with such deficiencies banks may follow the following guidelines:
>
> a) Banks should ensure that drawings in

> the working capital accounts are covered by the adequacy of current assets, since current assets are first appropriated in times of distress. Drawing power is required to be arrived at based on the stock statement which is current. However, considering the difficulties of large borrowers, stock statements relied upon by the banks for determining drawing power should not be older than three months. The outstanding in the account based on drawing power calculated from stock statements older than three months, would be deemed as irregular.
>
> A working capital borrowal account will become NPA if such irregular drawings are permitted in the account for a continuous period of 90 days even though the unit may be working or the borrower's financial position is satisfactory.
>
> b) Regular and ad hoc credit limits need to be reviewed/regularised not later than three months from the due date/date of ad hoc sanction. In case of constraints such as non-availability of financial statements and other data from the borrowers, the branch should furnish evidence to show that renewal/review of credit limits is already on and would be completed soon. In any case, delay beyond six months is not considered desirable as a general discipline. Hence, an account where the regular/ad hoc credit limits have not been reviewed/renewed within 180 days from the due date/date of ad hoc sanction will be treated as NPA."

19. Para 4.2.4 requires the bank to upgrade loan accounts classified as NPAs and the said paragraph is extracted below:

> "4.2.4 Upgradation of loan accounts classified as NPAs.
>
> If arrears of interest and principal are paid by the borrower in the case of loan accounts classified as NPAs, the account should no longer be treated as nonperforming and may be classified as 'standard' accounts. With regard to upgradation of a restructured/rescheduled account which is classified as NPA contents of paragraphs 4.2.14 and 4.2.15 will be applicable."

The obligation of the bank to upgrade loan accounts has been reiterated by the Reserve Bank of India in subsequent circulars as well.

20. What emerges from a reading of the circular is that all on a sudden, an account cannot be classified to be an NPA. On the other hand, the bank can classify an account as an NPA only when interest or instalment of principal remains overdue for a period of more than 90 days in respect of a term loan. In so far as cash credit account is concerned, the account remains out of order if the outstanding balance remains continuously in excess of the sanctioned limit/drawing power. It is also stated that in cases where the outstanding balance in the principal opearting account is less than the sanctioned limit/drawing power, but there are no credits continuously for 90 days as on the date of

balance sheet or credits are not enough to cover the interest debited during the said period, such accounts should be treated as out of order. Therefore, a minimum 90 days period is required in terms of the aforesaid provisions of the guidelines to classify an account as an NPA. Similarly, the existence of some deficiencies which are temporary in nature such as non-availability of adequate drawing power should not be a reason for classifying an advance as NPA. Further, the bank is also required to upgrade the loan account already classified as NPA if arrears of interest and principal are paid by the borrower.

21. In so far as the facts of this case, the bank has classified the accounts of the petitioners as NPA on 31-3-2007 when the outstanding was above the limits fixed. In the counter affidavits filed not an attempt is made by the Bank to explain the position for at least the period specified in the notification prior to 31-3-2007, to justify the classification as NPA. However, in view of the admitted remittance of Rs.24.25 lakhs during the period from 13-8-2007 to 25-8-2007 and other remittances made the outstandings as on 15-9-2007

were much below the limits fixed by the bank. Therefore, as on 15-9-2007, in terms of para 4.2.4 of the prudential norms issued by the Reserve Bank of India the bank ought to have upgraded the loan accounts of the petitioners which were already classified as NPAs on 31.03.2007. This has not been done by the bank. On the other hand, for the mere fact that the accounts of the petitioners were classified as NPAs as early as on 31-3-2007, ignoring the changed position, on 14.09.2007, the bank proceeded to take over possession of the running concerns of the petitioners and the other mortgaged properties.

22. Nowhere in the affidavits filed by the bank has it made any attempt to explain as to how the action taken by them is in compliance with the Reserve Bank of India guidelines. Therefore, they have no case that what they have done is in terms of Section 2(o) of the Act. If that be so, there is violation of the Reserve Bank of India guidelines in classifying the petitioners account as NPAs. Once it is held to be so, all further action taken on the basis that the petitioners' accounts were NPAs also have to be declared illegal and

arbitrary. It may be true that power has been conferred on the bank to classify an asset as an NPA. But the conferment of power and the exercise thereof are two different aspects. When power conferred on an authority is exercised in an arbitrary manner the court is entitled to examine the manner in which the power has been exercised. If it is found that there has been illegal exercise of power, the court will hold that the power conferred is not for exercised in the manner it has been done. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely and can validly be used only in the right and proper way which parliament when conferring it, is presumed to have intended. In this case the bank has exercised the power conferred under the provisions of the Act in a most arbitrary manner and therefore all further action taken by them against the petitioners has to be declared null and void.

23. In this context I should refer to the judgment of the Apex Court in ***Mardia Chemicals v. Union of India*** {**2004 (2) KLT 273 (SC)**} in which the question as to whether it is on the whims and fancies of the financial

institutions to classify the assets as non-performing assets, has been dealt with in paragraph 37. It has been held that as a matter of fact a policy has been laid down by the Reserve Bank of India providing guidelines in the matter of declaring an asset as a non-performing asset and that is quite evident from the guidelines laid down by the Reserve Bank of India laying down the terms and conditions and circumstances in which the debt is to be classified as non-performing asset as early as possible. Referring to the said guidelines the court found that there are guidelines for treating the debt as a non-performing asset. I am afraid that the argument raised before the Apex Court has come true in this case.

24. The further question that remains to be dealt with is whether the only remedy available to the petitioners is to file an appeal under Section 17 of the Act. It is true that in the Apex Court judgment referred to above, it is held in paragraph 80 that on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open to the borrower to file an

appeal under Section 17 of the Act before the Debt Recovery Tribunal.

25. My examination in this case was to be limited extent whether the bank has acted arbitrarily in classifying the accounts as NPA and whether there was violation of the guidelines issued by the Reserve Bank of India. My finding is that the bank has not placed materials to satisfy the court that the guidelines issued by the Reserve Bank of India has been complied with and that this power has been exercised in an arbitrary manner. When an act is complained to be without jurisdiction or when there is arbitrary exercise of power, this Court is entitled to examine the correctness of the same in exercise of its power under Article 226 of the Constitution of India.

26. The question whether availability of an alternate remedy is an absolute bar for exercising powers under Article 226 of the Constitution has been considered by the Apex Court on various occasions. It is an accepted principle that the availability of alternate remedy is not an absolute bar, but a self-imposed restriction and this issue has been dealt with

in ***State of H.P. v. Gujarat Ambuja Cement Ltd.*** {**(2005) 6 SCC 499**} in the following terms:

> "Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in ***L. Hirday Narain v. ITO*** {(1970) 2 SCC 355} that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

This Court had occasion to deal with an almost identical question in the case of ***Padmanabhan & Others v. The Commissioner, HR & CE Department & Others*** {**ILR 2007(3) Kerala Series 289**}. In a case arising under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 itself,

the Bombay High Court in the case of ***Manoj D. Kapasi & Another v. Union of India & Others*** {**2005 (125) Company Cases 676**} held as follows:

> "True it is that in the event of any measures being taken by a bank or when any order is passed by the DRT an appeal ought to be preferred as provided under the statute. However, as far as the writ court is concerned, the rule of exhaustion of internal statutory remedy is a rule of self-limitation as has been stated by the apex court time and again. In the present case, the question was with respect to action of respondent No. 2 and whether it was in accordance with law. Prima facie, we do not find that notice of sale was in accordance with the statutory rules nor does the impugned order passed by the DRT take cognisance of these breaches. In the circumstances, we allow this petition in terms of prayer clauses (a) and (c-i) though without any order for costs."

27. I am convinced that a patent illegality has been committed by the bank and the bank has exercised the power in a most arbitrary manner. The consequence of such exercise of power is the immediate closure of the business establishments run by the petitioners 1 to 3 leaving at least 140 employees jobless. This has been done ignoring the guidelines of the Reserve Bank of India and despite the availability of security worth more than Rs.8 crores. Inspite of this, when the bank

has acted in a manner like this, this Court should not shut its eyes and drive the petitioners to pursue the alternate remedy.

28. In the result, I declare that the action of the 1st Respondent Bank in classifying the accounts of the petitioners as NPA is illegal and arbitrary and a superior officer of the Bank shall re-examine the question whether the accounts of the petitioners are liable to be classified as NPAs strictly following the guidelines issued by the Reserve Bank of India. For this purpose if the petitioners are to produce any documents, the concerned officer of Bank will be entitled to call upon them to produce the same. Until that is done, all actions that have been taken by the bank shall be withdrawn and the status quo as on 31-3-2007 in so far as the proceedings against the petitioners are concerned, shall be restored.

29. The writ petition is disposed of as above.

ANTONY DOMINIC,JUDGE

jan/-